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No. 06-784

In The
Supreme Court of the United States

FACULTY RIGHTS COALITION, *ET AL.*,
Petitioners.

v.

GEORGE C. HANKS, JR., *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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IN PROPRIA CAUSA ET PERSONA

QUESTIONS PRESENTED

1. Should a judge who has received compensation for speaking or teaching at a university law school stand recused in a case in which that university or one of its officials is a party?

2. Did the District Court abuse its authority by sanctioning Petitioners for advocating in federal court that the answer to the above question be "yes," and by dismissing Petitioners' civil rights action and a related state-law open records act claim with prejudice?

3. Did District Judge Lynn N. Hughes err in failing to recuse himself, where Judge Hughes had – like the Texas judges against whom Petitioners sought injunctive relief -- accepted money from the University of Houston?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Petitioners

Faculty Rights Coalition
Wolfgang P. Hirczy de Mino ("the Named Plaintiff")

Defendants-Respondents

George C. Hanks, Jr., in his official capacity
Unnamed Adjunct Professors of Law,
in their official capacities
Dona G. Hamilton, in her official capacities

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

This case presents a fundamental question concerning the perception and reality of integrity and impartiality in the judicial system. The Court should grant the petition in order to provide state and federal judicial officers with a bright-line rule as whether they are disqualified from hearing cases involving institutions of higher education from which they have accepted honoraria, or something else of value, for teaching or for speaking engagements.

The Fifth Circuit declined to fashion such a rule in the case at bar, and affirmed the District Court's non-recusal, but the issue has not come to rest, and is bound to recur with frequency. In another faculty employment law case, U.S. District Court Judge Sam Sparks' impartiality was recently called into question on account of his acceptance of free football tickets from the Defendant

University, resulting in his recusal.[1] In the case at bar, more is at issue - payments to judges ranging from $1,000 to nearly $30,000 by a party appearing with some regularity before them, denial of an Open Records Act request seeking information on the payments and its recipients, and denial of the opportunity to engage in pretrial discovery to obtain the University's financial records.

OPINIONS BELOW

The opinion of the appellate court below is not reported, but is available on Westlaw and on the Fifth Circuit's web site.

Faculty Rights Coalition v. Hanks, Nos. 05-20213, 05-20348 (5th Cir. 2006), consolidated with *Hirczy v. Hamilton*, No. 05-20213, 2006 WL 1816372 C.A.5 (Tex) (5th Cir. 2006).

JURISDICTION

The court of appeals entered judgment on June 29, 2006. No motion for rehearing or rehearing en banc was filed.

This Court has jurisdiction under 28 U.S.C. §1254(1).

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[1] Associated Press. *Football Ticket Inquiry Prompts Judge's Recusal, Jurist Bows out of UT Lawsuit, but Says Games Were a 'Small Token Favor.'* HOUSTON CHRON. Sep. 8, 2006; Ralph K. M. Haurwitz. *Free Football Tickets? Judges Say Yes, Legal Scholars Say UT's Offers Raise Ethical Concerns; Justices Say Practice Is No Big Deal.* AUSTIN AMERICAN-STATESMAN, Sep. 2, 2006; *Texas-Austin Gave 30 Judges Free or Discounted Football Tickets*. CHRON. OF HIGHER EDUCATION, Sep. 4, 2006.

STATUTORY PROVISION INVOLVED

28 U.S.C. 455(b)(2) states:

Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

Petitioners filed suit to challenge the failure of judges who had accepted money for teaching or speaking at the University of Houston law school to recuse themselves from cases in which the University or a University official is a party, and sought injunctive relief against them. In a separate suit naming the University's General Counsel, Dona G. Hamilton, as a party Petitioners sought an order requiring the University to release a complete list of such judges and records of payments made to them under the Texas Public Information Act, and an order enjoining the University from paying judges who hear cases against the University or its officials.

Respondent George C. Hanks, Jr. had decided the case that resulted in faculty members' loss of the right to sue the University of Houston for breach of contract when affirmed and established as controlling precedent on appeal, and had failed to recuse himself from a then pending case involving the issue of whether the University's immunity should be extended to its provost.

Other Harris County District Court Judges (Judge Samuel Grant Dorfman and Judge Kenneth Wise), likewise refused or otherwise failed to recuse themselves from litigation in which the University or one of its officials was a party even though they were on the University's payroll, or were paid through a foundation at the University's behest.

Petitioners averred in their complaint that the judges' nonrecusal denies faculty members in employment disputes the

perception and reality of fairness in the resolution of their claims against their employer in violation of their due process rights, and that the dismissal of claims on immunity grounds denied them the right to access the courts. Petitioners did not seek monetary relief other than costs and attorneys fees. 28 U.S.C.§§ 1983, 1988.

The District Court had jurisdiction under 28 U.S.C. §§1331 and 1343.

District Court Judge Lynn N. Hughes dismissed the claims for failure to state a claim on his own initiative, and sanctioned the Named Plaintiff sua sponte for bringing allegedly baseless litigation.

The Texas Attorney General subsequently ordered the release of records on payments made by the University to judges and justices in response to Petitioners' request under the Texas Public Information Act. The documents revealed that Judge Lynn N. Hughes had himself received payment from the same source as the Defendants. Plaintiff moved for vacature of the dismissal and sanctions order entered by the District Court, for Judge Hughes' recusal under 28 U.S.C. §455, and for transfer of the case to another judge. Judge Hughes denied the motions and prohibited Petitioners from filing any further actions in the Southern District of Texas without his permission.

The court of appeals declined Petitioners' invitation to fashion a new disqualification rule, held that Plaintiffs did not have standing to challenge the nonrecusal of state judges, and ruled that Judge Hughes had properly used his "inherent power" to enjoin Petitioners from bringing future litigation in the Southern District without first being granted permission by the same judge. The court of appeals upheld the denial of the motion to disqualify Judge Hughes on the ground that it was untimely.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

Although many judges and justices around the nation serve as teachers at law schools and participate in professional events, and many accept payment or other consideration for such appearances, there is currently no clear rule as to whether and when they should recuse themselves, or are disqualified, when a sponsor or a party with a connection to the sponsor appears before them.

As the news media pay increasing attention to judges' acceptance of money and free trips from parties with business in their courts, the public's confidence in the integrity of the judicial process is eroding.

The issue is ripe to be addressed in an authoritative fashion. This Court should clarify under what conditions recusal is required in order to provide proper guidance to the lower courts and promote the public's confidence in the judicial system.

The case at bar offers a suitable opportunity to do so because it presents more than an adverse ruling on a motion to recuse. It highlights the inadequacy of the existing recusal regime, which allows judges to suppress complaints and evidence regarding their own conflicts of interest, and use their juri ial authority to "shoot the messenger," rather than remedy the problem.

II. THE CASE AT BAR ILLUSTRATES THE PROBLEM OF JUDGES SITTING IN JUDGEMENT OF THEIR OWN CONFLICTS OF INTEREST.

Judge Hughes responded to Petitioners' request for injunctive relief against state court judges who refused to recuse themselves from cases involving their after-hour employer by prohibiting the

Named Plaintiff from bringing any further legal action in the Southern District unless he agreed to it.

Judge Hughes opined that state judges' acceptance of money from the University was not a conflict of interest requiring recusal, suggested that Petitioner was "paranoid," and advised Petitioners to go to the Legislature if they found fault with the practice.

Judge Hughes did so as one of the judges to whom the University of Houston had paid money, as later shown by the documents the University was required to release when the Open Records Division ruled in Petitioners' favor notwithstanding that fact that Judge Hughes had prohibited discovery in the federal action and had dismissed Petitioners' Open Records Act claim along with their Section 1983 claims.

Section 455(a) of Title 28 provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147 (1994).

In the underlying case, however, Judge Hughes not only failed to recuse himself, but used his authority as a federal judge to impede and suppress Plaintiffs' efforts to expose and end the University's practice of currying favor with the local judiciary, and thus attempted to protect the affected judges from public scrutiny. Judge Hughes justified the imposition of sanctions by stating that Petitioner had brought groundless litigation resulting in waste of taxpayer money.

Petitioners' factual allegations, however, were anything but baseless. They are supported by the documentary exhibits referenced in Plaintiff's live pleadings and motions, filed with the clerk, and are part of the record on appeal. Indeed it is undisputed that the judges had accepted money from the University of Houston, either directly, or indirectly through the law foundation, and had not

recused, or had refused to recuse themselves when asked to do so in cases involving the University or one of its officials. The articulation of truthful claims of questionable conduct of public officials, and the publication of the documents proving them, hardly provides cause for charges of baselessness, much less for sanctions. The type of facts at issue here, and the speech pertaining to it, are at the core of the First Amendment, which protects not only the speech, but also the right of individuals to access the courts to seek a remedy for violation of their rights. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1994).

Nor were Plaintiff's claims legally baseless. Petitioners satisfies the standing criteria that proved fatal to the complainants in *Public Citizen Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2002), who challenged the acceptance of political donations by Texas judges from lawyers, law firms, and interest groups involved in litigation.

Although the Bomer plaintiffs were unsuccessful, they were not sanctioned. Nor was Public Citizen Inc. barred from bringing future consumer and citizen advocacy law suit on the ground that the group was "litigious" and did not succeed in some of their cases. If losing cases provided proper grounds for preclusion orders, most lawyers would have to change careers, and most, if not all, civil rights litigation groups would have to be put out of the business along with the Faculty Rights Coalition.

III. PETITIONERS HAVE STANDING TO COMPLAIN OF INJURY BOTH IN STATE AND IN FEDERAL COURT.

In *Public Citizen Inc. v. Bomer*, 274 F.3d 212 (5th Cir. 2002) the Fifth Circuit dismissed a challenge to the practice of campaign contributions to Texas judges by attorneys practicing in their courts. The Court did so on the ground that the plaintiffs did not have standing because they had not shown that they had suffered actual harm. *Lujan v. Defenders of Wildlife* , 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992).

In the case at bar, by contrast, the Named Plaintiff and the category of plaintiffs represented by the Faculty Rights Coalition satisfied the standing requirement because they were, or stood to be, directly and adversely affected by the rulings of the challenged judges who had a conflict of interest arising from their acceptance of money from the University.

George C. Hanks, Jr., the judge named as lead Defendant, was responsible for a change in case law that deprived faculty members of the right to sue the University for breach of contract which they had enjoyed under previous precedent. *Freedman v. Univ. of Houston*, 110 S.W.3d 504 (Tex.App.-Houston [1st Dist] 2003, no pet.)(holding that state university is immune from breach of contract suit), overruling *Fazekas v. University of Houston*, 565 S.W.2d 299 (Tex. Civ App.--Houston [1st Dist.] 1978, writ ref'd n.r.e.)(holding that university may be sued based on "sue and be sued" language in the Tex. Educ. Code §111.33).[2]

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[2] By contrast, when in a breach of contract suit against Texas Southern University came before the First Court of Appeals, Respondent Hanks recently ruled that this state university could be sued even in the absence of any statutory waiver. *See Texas S. Univ. v. State Street Bank*, ___ S.W.3d ___, 2006 WL 1549744 (Tex.App.-Houston [1st Dist.] June 8, 2006)(recognizing waiver of immunity by conduct). This decision not only conflicts with the same court's immunity rulings in the cases involving the University of Houston, but also challenges the Texas Supreme Court's holding that, in the absence of a legislative waiver, TSU is immune to breach of contract suits. *See Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401 (Tex. 1997). Moreover, the First Court of Appeals had expressly declined to create a waiver-by-conduct exception in the absence of guidance from the Supreme Court in an opinion released on the same day as its opinion in *De Mino v. Sheridan*. *See Noah v. Univ. of Texas Med. Branch at Galveston*, 176 S.W.3d 350 (Tex.App.-Houston 2004, pet. denied).

When Petitioners filed the underlying suit, Justice Hanks was participating in *De Mino v. Sheridan*, in which the First Court of Appeals considered the extension of the immunity it had granted to the University of Houston in *Freedman* to the University's officials, again endeavoring to set new precedent adverse to the interests of individual with employment disputes involving the university.[3]

Unlike the plaintiffs in *Bomer*, Petitioners here suffered concrete injury because they stood to lose their right to bring suit against the University and its officials and were denied the right to a adjudication of the merits of their claims. The First Court of Appeals deprived faculty members of the right sue for breach of contract by embracing Respondent Hanks' ruling in *Freedman*, and considered expanding that immunity holding in *De Mino v. Sheridan* so that university employees could no longer sue university administrators for prospective injunctive in their official capacity either.*Contra Ex parte Young*, 209 U.S. 123, 155-56 (1908).

The claim against state judges who dismissed suits against the University or against University officials are not barred as an impermissible collateral attacks on a state court judgment to the extent the merits of the plaintiffs' claims were never reached and never determined by final judgment because the University and its officials have been rendered immune to suit. *See Freedman v. Univ. of Houston*, 110 S.W.3d 504 (Tex.App.-Houston [1st Dist] 2003, no pet.)(holding that University is immune from breach of contract suit and dismissing suit for lack of jurisdiction); *Hirczy de Mino v. Univ. of Houston*, No. 03-03-00311-CV, 2004 Tex. App. 2004 WL 2296131 (Tex. App.–Austin Oct. 14, 2004, pet

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[3] De Mino requested that Justice Hanks not participate, but the motion was struck by Justice Sam Nuchia, acting for the Court, and thus not formally decided on the merits.

denied)(following *Freedman* in holding that the University was immune to breach of contract claims and dismissing cause without); *De Miño v. Sheridan*, 176 S.W.3d 359 (Tex.App.– Houston [1st Dist.] 2004, no pet.)(extending immunity holding to include non-contract claims against university's official).

Nor was the conflict of interest problem limited to the appellate level. The judge presiding over *De Mino v. Sheridan* in the trial court, Samuel Grant Dorfman, expressly refused to recuse himself even though he was teaching at the UH Law Center, expressed his desire to continue teaching there in future semesters, but was not sure he would be reappointed. The Defendant Provost had authority over appointments and reappointments at the university. By contrast, Judge David Bernal had earlier recused himself from the case, stating that he had a conflict of interest because his wife worked for the University of Houston.

IV. DISQUALIFICATION SHOULD BE REQUIRED BY THE FACTS CREATING A CONFLICT OF INTEREST, REGARDLESS OF WHETHER OR WHEN THEY ARE DISCOVERED BY THE ADVERSELY AFFECTED PARTY

The Fifth Circuit faulted Plaintiffs for not filing the motion to recuse Judge Hughes on time. However, Dona Hamilton's office at the University of Houston only released the records of payments to Judge Hughes and to the defendant Texas judges after Judge Hughes had dismissed *Faculty Rights Coalition v. Hanks* and the Open Records Division had ruled that the University could no longer rely on the litigation exception to deny access to the documents under the Texas Public Information Act. Petitioners could not obtain the documents through a request for production in federal court because Judge Hughes had entered an order prohibiting discovery, and dismissed both actions before Defendants even filed an answer.

The open records letter ruling states in relevant part:

> [W]e note that relevant facts and circumstances have changed since the issuance of Open Records Letter No. 2005-01643 for the information that we determined the system could withhold under section 552.103 of the Government Code. At the time of that ruling, employees of the system, in their official capacities, were defendants in a pending lawsuit filed by the requestor, styled *Faculty Rights Coalition v. George C. Hanks*, No. H-04-4494, which was filed on November 26, 2004 in the United States District Court for the Southern District of Texas, Houston Division. We determined, therefore, that the system was involved in pending litigation on the date it received the request for information that was the subject of Open Records Letter No. 2005-01643. However, you advise that the court dismissed the lawsuit against the employees with prejudice on February 9, 2005. As such, litigation is no longer pending. Therefore, the system may no longer rely on Open Records Letter No. 2005-01643 for the information that we determined the system could withhold under section 552.103.
>
> Abbott Open Records Letter Ruling OR2005-03942 (2005). [4]

There must be a reasonable factual basis for calling the judge's impartiality into question. *See United States v. Avilez-Reyes*, 160 F.3d 258, 259 (5th Cir. 1998). Had Plaintiffs moved for recusal without solid documentary evidence in hand, Judge Hughes might have imposed even more severe sanctions, or held the named plaintiff in contempt for impugning the integrity of the judge. Such apprehension was reasonable in light of the circumstances. At the February 2, 2005 conference in his chambers Judge Hughes threatened to impose sanctions and a preclusion order if Plaintiffs

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[4] www.oag.state.tx.us/opinions/orl50abbott/orl2005/or0503942.htm (visited 9/23/2006)

did not drop the suit against the University officials. Plaintiff could have filed a notice of voluntary dismissal unilaterally at the time (or amended their pleadings as a matter of right) because Defendants had not filed an answer. Fed R. Civ. P. 41(a)(1). Plaintiffs chose to stand by their pleadings, however, and the Judge made good on his threat to shut down the Faculty Rights Coalition litigation activities in the Southern District of Texas. He did so by entering permanent injunctions against the Plaintiffs in both underlying cases. The preclusion order was also docketed separately as a miscellaneous matter, apparently to enhance its stigmatizing effect as to Petitioners, and to deter other would-be critics of judicial impropriety.

V. ADVOCACY OF CHANGE IN THE LAW GOVERNING RECUSAL IS PROTECTED ACTIVITY AND DOES NOT PROVIDE A PROPER BASIS FOR SANCTIONS

Texas Rule of Civil Procedure 13 and Federal Rule of Civil Procedure 11 do not prohibit counsel from advocating the existing case law should be modified or changed. Fed. R. Civ. P. 11(b)(2).

To the extent the District Court deemed the proposition that judges should recuse themselves on account of preexisting connections to parties before them as frivolous and sanctionable, the position is undercut by the fact that the Texas Supreme Court has since adopted it as controlling precedent for Texas. *See Tesco American, Inc. v. Strong Industries, Inc.*, No. 04-0269 (Tex. March 17, 2006). Not only did the State's highest court for civil matters hold that recusal was mandatory where a justice had been associated with the law firm representing a party in a case before her, it also held that the motion to disqualify was properly brought after the court of appeals' opinion and judgment had already issued. In reaching this conclusion, the Court overruled the First Court of Appeals, sitting en banc, and found it in error. The majority rejected the proposition that the error was not harmful and remanded for

redetermination of the merits of the appeal without the participation of the disqualified justice. *Also see Burkett v. State of Texas*, 196 S.W.3d 892 (Tex.App.-Texarkana, 2006)(reversal required even where reviewing court is convinced that disqualified judge's participation was harmless, because deprivation of defendant's right to a trial before an impartial judge is a structural error that is not subject to harmless error analysis, citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)).

If the position on disqualification that Petitioners articulated in this litigation is frivolous, then the Texas Supreme Court's position in *Tesco* is even more so, for in *Tesco* Justice Higley's ties to the party before her were very much more attenuated than they are here. In the case at bar, Judges George C. Hanks, Jr., Samuel Grant Dorfman, and Kenneth Wise each had a contemporaneous relationship with the Defendant University, rather than merely a past association with Defendant's counsel. If the circumstance in *Tesco* mandate disqualification because the appearance of partiality tainted the judgment, the reasons are all the more compelling in the case before this Court.

VI. THE CASE AT BAR ILLUSTRATES HOW A JUDGE'S CONFLICT OF INTEREST UNDERMINES ADJUDICATION BASED ON THE FACTS AND THE LAW

A person beset by bias and lack of impartiality will not let the facts get in the way and abandon an opinion already formed. The record in the case at bar supports the point. Judge Hughes had a personal stake in the matter not only because he had been a state judge, but because he too, had accepted money from the University of Houston. He thus had a psychological need to malign Petitioners because Petitioners challenged conduct Judge Hughes himself had engaged in as unethical. Judge Hughes justified the issuance of an injunction against Petitioner by declaring conclusorily that Named

Petitioner was "litigious" and engaged in a pattern of pursuing worthless causes and lawsuits.

The public record, and the record on appeal, however, reflects that the Named Petitioner had been a party in only one federal action that had proceeded to judgment at the time Judge Hughes felt impelled to issue his order banning future litigation without his prior consent. In that case the Fifth Circuit expressly found that the Named Plaintiff was a prevailing party because he had obtained an enforceable order against the University. The Court vacated U.S. District Judge David Hittner's award of costs in favor of the defendants on that basis. *See De Mino v. Achenbaum*, 81 Fed. Appx. 819 (5th Cir. 2003).

To the extent Judge Hughes' preclusion order was based on state family court litigation, it was inappropriate because federal courts abstain from hearing domestic relations matters. Nor does the filing of a petition for divorce and restraining order support the charge of litigiousness, much less Petitioner's submission of amicus briefs in state employment appeals such as *Freedman v. Univ. of Houston.*[5]

To the extent Judge Hughs preclusion order is based on the dismissal of Petitioners' state law claims against the University of Houston without an adjudication on the merits, this holding cannot be squared with the finding that the Petitioners did not have standing in federal court, and that dismissal on the pleadings was thus appropriate. *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001).

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[5] In any event, the preclusion order is limited to litigation in federal court, and is thus not fashioned to prevent further state court litigation. Accordingly, Plaintiffs' allegedly prolific litigation in state court cannot support a ban against further public interest litigation in federal court.

The factual grounds recited by the District Court for issuance of sanctions are incorrect, but the misrepresentations that put Petitioners in a bad light are perfectly understandable in light of the fact that the Judge was personally affected by the matter sought to be litigated. That is precisely why judges who are interested in the controversy they asked to decide should be automatically disqualified under 28 U.S.C. 455.

As this case demonstrates, judges can be poor judges of their own conflicts of interest and the predispositions those conflicts entail.

That Judge Hughes' impartiality was compromised is further seen in the manner in which he imposed sanctions.

Fed. R. Civ. P. 11 authorizes the imposition of sanctions for violations of its substantive provisions, but only after notice and a reasonable opportunity to respond. In the case at bar, Judge Hughes issued an order to appear in his chambers (not in open court, as stated in the appellate opinion), but did not give Plaintiffs notice that the purpose of the in-chambers conference was to dismiss the complaint and to impose sanctions on Plaintiffs for filing it.

The Fifth Circuit sidestepped the issue of non-compliance with the procedural protections of Rule 11 by holding that Judge Hughes had imposed sanctions in the exercise of his inherent authority as a federal judge. Even under that theory, however, Judge Hughes was not exempted from according the parties he wanted to sanction due process. At the minimum, due process requires that a litigant to be sanctioned be given notice of charges, and an opportunity to prepare a defense. Here, Judge Hughes did not reveal his intent to prevent Petitioners from litigating their injunctive relief claims against state judges in federal court, and to sanction them for trying to do so, when he summoned Petitioners to appear in his chambers.

VII. THE CASE AT BAR DEMONSTRATES THAT THE EXISTING MECHANISM FOR JUDICIAL RECUSAL IS INADEQUATE BECAUSE CHALLENGED JUDGES HAVE THE POWER AND OPPORTUNITY TO RETALIATE, AND SOME DO

Most lawyers understand that they cannot afford to challenge a judge for partiality even in a clear-cut case of conflict of interest because doing so may put their career and livelihood at risk. To move for recusal of a judge necessarily impugns the judge's integrity for it would not be necessary if the judge had acknowledged the conflict and recused himself or herself *sua sponte*.

In the case at bar the Named Plaintiff was willing to take the chance, and thus put the existing remedies to the test. As a result, the Named Plaintiff and his advocacy organization have been barred from pursuing further civil rights litigation in the Southern District of Texas because any and all further litigation is subject to the control of the very judge who himself, unbeknownst to Plaintiffs, had the same conflict of interest that formed the basis of Petitioners' suit.

The appellate court sided with the challenged judge and concurred with said judge on the notion that Plaintiff had committed misconduct, rather than the judges who had taken money from one of the parties before them. The alleged misconduct consists in efforts to publicize judicial conflicts of interest and urging the judiciary, rather then the legislature, to take the necessary steps to assure the perception and reality of impartiality in the resolution of legal claims.

Judge Hughes conceded in chambers that Petitioners had the first amendment right to advocate for change. He nevertheless resorted on his "inherent authority" as a federal judge to squelch Petitioners' complaints, and did what he could to assure that other

would be deterred from engaging in similar misguided efforts to promote judicial integrity under the existing rules of procedure and substantive law, and to advocate their modification to the extent they condoned the judicial conduct Petitioners challenged as improper.

Because of the judiciary's failure to keep its own house in order and self-police its members, public and media attention to instances of undue influence and so-called "junkets" has heightened. Legislative initiatives are under way to promote greater transparency and to reign in the practice of litigants and their lobbyists furnishing free trips, accommodations, amenities, and other consideration to judges in whose court they or their clients appear.

This Court should not ignore the problem while public confidence is eroding. This Court has the power to set binding precedent on the proper construction and application of 28 U.S.C. §455. After due deliberation, it should wisely use that power.

CONCLUSION

The Court should grant the petition, establish the bright-line rule that judges who have accepted payment from parties before them are automatically disqualified, and vacate the court of appeals' opinion and judgment with instructions to remand to the Southern District of Texas for further proceedings before a federal district judge who has not accepted honoraria paid by or at the behest of the University of Houston.

In the alternative, this Court should reverse the preclusion orders against Petitioners and render judgment that the injunctive relief claim against Respondent Hanks is moot because, unlike Judge Hughes, Justice Hanks did eventually recuse himself from the case in which both the Named Plaintiff and a University of Houston official were parties after the underlying civil rights action seeking

to enjoin Justice Hank from sitting in the case because he had been paid by the University was filed.

Respectfully submitted,

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COUNSEL FOR PETITIONERS
IN PROPRIA CAUSA ET PERSONA

SEPTEMBER 2006

APPENDIX A

FILED
June 29, 2006

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20213
Summary Calendar

WOLFGANG HIRCZY, Ph.D.,

Plaintiff – Appellant,

v.

DONA G. HAMILTON,

Defendant – Appellee.

Appeal from the United States District Court
for the Southern District of Texas
No. 05-cv-184

Consolidated with
No. 05-20348
Summary Calendar

FACULTY RIGHTS COALITION; WOLFGANG P. H. DE MINO,

Plaintiffs – Appellants,

v.

GEORGE C. HANKS; JANE NENNINGER BLAND; UNNAMED ADJUNCT PROFESSORS OF LAW,

Defendants – Appellees.

Appeals from the United States District Court
for the Southern District of Texas
04-cv-4494

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants challenge the district court's dismissal of their two cases, issuance of a permanent injunction, and denial of a recusal motion. For the reasons that follow, the district court's rulings were not in error.

I. BACKGROUND

Plaintiff-Appellant Wolfgang P. Hirczy de Mino is a former employee of the University of Houston who runs Plaintiff-Appellant Faculty Rights Coalition, an organization apparently

consisting solely of Hirczy de Mino.[1] In two separate cases, he sued Dona Hamilton, the general counsel for the University, Justices George Hanks and Jane Bland[2] of the First Court of Appeals in Houston, and unnamed adjunct professors of law. His suits were transferred to one district court judge and have been consolidated for this appeal. Hirczy de Mino sought to stop (1) judges, who are compensated by the University, from adjudicating cases in which the University is a party and (2) the University from compensating judges who hear cases in which the University is a party. He also brought an open records claim against Hamilton.

The district court dismissed Hirczy de Mino's suits pursuant to Federal Rule of Civil Procedure 12(b)(6) and issued a permanent injunction against Hirczy de Mino, stating that he may not file suit in the Southern District of Texas without written permission of the judge. Subsequently, Hirczy de Mino filed a motion to transfer, motion to vacate the permanent injunction, motion to recuse the district court judge, and motion for reconsideration. All of the motions were denied, with the recusal motion denied as moot. In his appeal, Hirczy de Mino challenges the dismissal, issuance of the permanent injunction, and denial of the motion to recuse.

II. DISCUSSION

A. Dismissal of Hirczy de Mino's Cases

We review *de novo* a dismissal for failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6). *GE Capital v. Posey*, 415 F.3d 391, 395 (5th Cir. 2005). Hirczy de Mino lacked standing to pursue his abstract claims

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[1] Because Hirczy de Mino and his organization are essentially one and the same, we refer to both Appellants only by his name.

[2] Justice Bland has been nonsuited.

against Hamilton and Hanks. The Supreme Court has identified three constitutional standing requirements: (1) the plaintiff must allege that she has suffered or imminently will suffer an injury; (2) the plaintiff must allege that the injury is fairly traceable to a the defendant's conduct; and (3) the plaintiff must allege that a favorable federal court decision is likely to redress the injury. *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). Here, Hirczy de Mino's standing fails on the first requirement. He has alleged no direct injury at the hands of Hamilton or Hanks. *See Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) ("The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.") (internal quotation marks omitted).

Furthermore, Hirczy de Mino's open records claim brought against Hamilton for University of Houston records fails. Without reaching the merits, we reject the open records claim because Hamilton is not the proper party. To bring a suit to produce information under the Texas Government Code, a plaintiff must sue the governmental body withholding the information. TEX. GOV'T CODE § 552.3215. Hirczy de Mino instead has brought suit against an individual. Therefore, his open records claim is invalid. Having conducted a *de novo* review, the district court's dismissal is affirmed.

B. Permanent Injunction Issued Against Hirczy de Mino

We review a district court's grant or denial of a permanent injunction for abuse of discretion. *Peaches Entm't Corp. v. Entm't Repertoire Assoc.*, 62 F.3d 690, 693 (5th Cir. 1995). The trial court abuses its discretion if it: (1) relies on clearly erroneous factual findings when deciding to grant or deny the permanent injunction, (2) relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction, or (3) misapplies the factual or

legal conclusions when fashioning its injunctive relief. *Id.* The record demonstrates that the district court relied on Hirczy de Mino's litigious history of filing numerous cases, often without legal or factual support, in making its determination. Moreover, the district court discussed some of his previous suits in chambers and in court, giving Hirczy de Mino an opportunity to defend himself before the court entered the order.

Contrary to Hirczy de Mino's contention, a court may issue sanctions *sua sponte*. FED. R. CIV. P. 11. A court has the power to enter orders prohibiting future filings not only from various statutes and rules relating to sanctions but also from the inherent power of the court to protect its jurisdiction and judgments and control its docket. *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986). Furthermore, this permanent injunction was "limited to what is sufficient to deter repetition" of his misconduct. FED. R. CIV. P. 11. Therefore, we find that the district court did not abuse its discretion in ordering the permanent injunction.

C. Motion to Recuse Was Untimely

We review a denial of a motion to recuse for abuse of discretion. *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999). In the instant case, Hirczy de Mino failed to file his motion to recuse in a timely manner. The general rule on timeliness requires that "one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *Travelers Ins. v. Liljeberg Enters.*, 38 F.3d 1404, 1410 (5th Cir. 1994). In fact, the "most egregious delay" is when "a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal." *See United States v. Sanford*, 157 F.3d 987, 989 (5th Cir. 1998).

Here, Hirczy de Mino learned directly from the Judge's disclosure to the parties in open court of the district court's

association with the University. Nevertheless, he waited over two months and until after the adverse decision to file his motion to recuse. He thus committed the worst type of delay by knowing facts that allegedly might lead to recusal but waiting until after he received an unfavorable ruling to file his motion to recuse. We have deemed this to be almost "*per se* untimeliness." *Id.* Because Hirczy de Mino's motion was untimely, a substantive review for abuse of discretion is unnecessary. The district court properly denied the motion to recuse as moot because it was untimely.[3]

III. CONCLUSION

Hirczy de Mino challenges the dismissal of his case, the issuance of a permanent injunction against him, and the denial of his motion to recuse. All three challenges fail. Accordingly, we AFFIRM the district court's rulings.

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[3] This Court declines Hirczy de Mino's invitation to create a new bright-line rule regarding recusal because, *inter alia*, he does not offer any legal support for that theory.

U.S. DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

United States Courts
Southern District of Texas
ENTERED
FEB 06 2005

Wolfgang Hirczy,	§	
Plaintiff,	§	
	§	
versus	§	Civil Action H-05-184
	§	
Dona Hamilton,	§	
Defendant.	§	

Wolfgang Hirczy,	§	
Plaintiff,	§	
versus	§	Civil Action H-04-4494
	§	
George C. Hanks, et al.,	§	
Defendants.	§	

Final Order of Dismissal and Permanent Injunction

1. The cases are dismissed with prejudice for failure to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6).

2. Hirczy's future cases must be assigned to Judge Lynn N. Hughes.

3. Hirczy may not file suit in the Southern District of Texas without the written permission of Judge Lynn N. Hughes.

Signed February 8, 2005, at Houston, Texas

/s

Lynn N. Hughes
United States District Judge

U.S. DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Wolfgang Hirczy,	§	
	§	
Plaintiff,	§	
	§	
versus	§	Civil Action H-04-4494
	§	
George C. Hanks, et al.,	§	
	§	
Defendants.	§	
	§	

United States Courts
Southern District of Texas
ENTERED
APR 21 2005
Michael N. Milby, Clerk of Court

Order

1. Hirczy's motion for recusal is denied as moot (20).

2. His motion for reconsideration is also denied (22).

Signed April 19, 2005, at Houston, Texas

/s
Lynn N. Hughes
United States District Judge